IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al.	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**Case No. 4:05-cv-00329-GKF-PJC**
	)	
Tyson Foods, Inc., et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' MOTION TO EXCLUDE THE TESTIMONY OF DR. C. ROBERT TAYLOR PURSUANT TO *DAUBERT V. MERRELL DOW PHARMACEUTICALS, INC.*

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Defendants respectfully move the Court for an order excluding the testimony of Dr. C. Robert Taylor as unreliable under Federal Rule of Evidence 702 and irrelevant under Rule 402. *See Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

INTRODUCTION

Dr. Taylor is an economics professor, but his proposed testimony is long on politics and short on economics. He dislikes the large companies that process chickens and turkeys and other birds and turn them into food because in his view they "threaten American democracy" (Deposition of Robert Taylor, Ph.D., taken January 8, 2008 (hereinafter "Taylor Dep. No. 1"; Ex. 1) at 138) and their activities have caused the United States to "slither[] toward fascism." (*Id.* at 139.) He pines for an economic system that pays more to the growers who own the land and raise the birds, who are "serfs" (*id.* at 144) and "uninformed, gullible" "bubbas." (*Id.* at 154.)

Dr. Taylor is entitled to his personal opinions, of course, but in this case, he may present only economic opinions based on valid, scientific methodology. He has not done so. Here, Dr. Taylor has reached his conclusions without ever having talked to any grower in the Illinois River Watershed ("IRW"), (*id.* at 207; Deposition of Robert Taylor, Ph.D., taken July 15, 2008 (hereinafter "Taylor Dep. No. 2"; Ex. 2) at 7, 55) and without ever having set foot on a farm in the IRW. (Ex. 2: Taylor Dep. No. 2 at 120.) He will add nothing to the jury's understanding of whether one or more of the Defendants is legally responsible for the growers' use of poultry litter in the IRW. Without this Court's intervention, he will sow confusion about what, if any, damages any of the Defendants may have caused.

The structure of Dr. Taylor's proposed testimony is not obvious from his report, but it comprises three arguments:

First, integrators have complete market power over growers. (Paragraphs 7-49 of Dr. Taylor's report, hereinafter "Taylor R."; Ex. 3). This allows the integrators to prevent the growers from making a "fair" living. To make matters worse, the growers (and the banks that finance them) believe that they are making money when in fact they are not. This forces the growers to handle poultry litter "illegally." The integrators have magnified the effects of the growers' illegal handling of litter by forcing the growers in the IRW to locate their real estate close to the integrators' processing plants, concentrating the litter in small areas.

Second, Dr. Taylor has read historical literature about the dangers of pollution from poultry litter and from it divines how much familiarity each Defendant corporation had with those purported dangers at various unspecified points in time. (Paragraphs 50 through 63 of Dr. Taylor's report).

Finally, Dr. Taylor, possessing knowledge of the "true value" of the poultry litter that is superior to the knowledge of farmers and others who actually buy and sell it, opines that its value is "zero." (Paragraphs 64 through 83 of Dr. Taylor's report). That the actual participants in the economy of the IRW believe the litter has value, and actually buy it and sell it in the free market, is irrelevant to Dr. Taylor's analysis. By fooling the growers and those with whom they do business into thinking the poultry litter has value, the integrators save millions of dollars a year they would otherwise spend to haul litter away from the watershed.

In applying *Daubert* to determine the admissibility of an expert's opinion, courts examine a number of non-exclusive factors, including:

> (1) whether the opinion has been subjected to testing or is susceptible of such testing;

(2) whether the opinion has been subjected to publication and peer review;

(3) whether the methodology used has standards controlling its use and a known rate of error; and

(4) whether the theory has been accepted in the scientific community.

Truck Ins. Exch. v. MagneTek, Inc., 360 F.3d 1206, 1210 (10th Cir., 2004). *See Attorney General of the State of Oklahoma v. Tyson Foods, Inc., et al.*, ___ F.3d ___, 2009 WL 1313216, (10th Cir., May 13, 2009) (No. 08-5154, Slip. Op. at 17). These factors assist the Court in assessing the degree to which an expert's opinion is founded on proper scientific methods.

But here, Dr. Taylor's opinions and methodology could not possibly be subjected to peer review, because there is no methodology. The illogical leaps and gaps in reasoning are nothing short of breathtaking. As the Supreme Court has held, "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *General Electric v. Joiner*, 522 U.S. 136, 146 (1997). Because Dr. Taylor does not offer reasoned economic analysis, but instead speculation and political invective, his testimony should be excluded.

DISCUSSION

I. Dr. Taylor's opinion that the integrators enjoy complete market power over the growers is not based on any recognized methodology.

The first of the three parts of Dr. Taylor's opinion is summarized at ¶ 49 of his report:

> In summary, defendants' [sic] fully control who will be a grower, who will be responsible for disposal of waste and dead birds, and all contract terms. Defendants' [sic] also fully determine the location of poultry waste generation in the IRW, as well as how much waste is generated in the IRW.

(Ex. 3: Taylor R.) In short, according to Dr. Taylor, Defendants control (a) who will be a grower, (b) who will be responsible for "disposal," (c) all contract terms, (d) location of growers' operations, and (e) how much litter is generated.

According to Dr. Taylor, the Defendants accomplish this control with their monopsony power. (Ex. 2: Taylor Dep. No. 2 at 29.) Monopsony, if it existed, would be the mirror image of a monopoly: instead of the seller having complete power to dictate price and terms, the buyer has complete power to dictate price and terms. A monopsony is "a condition of the market in which there is but one buyer for a particular commodity." *Telecor Communs., Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1133 n.4 (10th Cir. 2002). (Examples would be the State of Oklahoma as purchaser of state highways, prisons, and other public works, or the United States as purchaser of fighter jets and aircraft carriers. Sellers of such items do not have many choices of buyers to do business with.)

A. Dr. Taylor did not perform a valid economic analysis of the relevant market to determine whether the integrators have monopsony power.

Competent economists can figure out whether a particular market is characterized by monopoly or monopsony power, or neither. The role of an economist in explaining these issues "is not to prove facts, but to opine on economic theory." *Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1079 (10th Cir. 2006). To do that, the economic expert must provide a "plausible explanation, based on sound economic theory" to support use of certain data to reach conclusions, and if he does not, his testimony should be excluded. *Id.* (*quoting Champagne Metals v. Ken-Mac Metals, Inc.*, 2002 U.S. Dist. LEXIS 27722 (W.D. Okla. Oct. 1, 2002)).

But nowhere in paragraphs 7 through 49 of Dr. Taylor's report is there anything that resembles economic analysis of what the relevant markets are, which growers operate in them, which integrators operate in them, or how much power, if any, one participant in the market has

over the other. Those paragraphs of the Taylor Report resemble nothing so much as an essay on "Poultry Production in the United States," the thesis of which would be Integrators have too much power; growers have too little. There needs to be a better balance of power. (Ex. 1: Taylor Dep. No. 1 at 31, 33.)

Obviously a buyer's (integrator's) power to demand particular terms from a seller (grower) is limited if the buyer has to compete with other buyers for the seller's goods. By definition, if the integrators compete with each other, they do not have monopsony power. So the question is: Do the integrators compete with each other for the growers' business in the IRW? Dr. Taylor admits that he has no idea if the integrators respond to competition from other integrators. (Ex. 2: Taylor Dep. No. 2 at 47-48.)

He has no idea whether competition exists because he has not looked. Dr. Taylor made no investigation of the actual relationship between growers and integrators in the IRW. (Ex. 1: Taylor Dep. No. 1 at 207.) Although he has read some of the contracts, he has not analyzed their individual economic terms or the grower's ability to move to another integrator. (*Id.* at 174.) Neither has he investigated:

- how many growers there are in the IRW,
- how many integrators there are,
- where or how close together the growers' farms are located (Taylor Dep. No. 2 at 42),
- where or how close together the integrators' facilities are located (Taylor Dep. No. 2 at 42), or
- how much money the growers in the IRW earn from their contracts with the integrators (Ex. 1: Taylor Dep. No. 1 at 172-73, 188.)

B. The factors Dr. Taylor considers have no foundation and are insufficient to demonstrate a monopsony.

Ignoring everything that an economist would need to know to determine the presence or absence of market power, Dr. Taylor focuses on four factors: "inadequate" grower income; "infrequent" switching by growers from one integrator to another; "excessive" uniformity of contracts with growers; and "refusal" of integrators to do business with growers who are located more than 50 miles from the integrators' facilities. (Ex. 3: Taylor R. at ¶ 36.) Not only do these views lack factual support, none of them uses any reproducible, recognized methodology. Therefore, Rules 402 and 702, *Daubert*, and *Kumho Tire* require their exclusion.

1. No facts and no methodology support Dr. Taylor's personal opinion that the growers do not make enough money.

Dr. Taylor believes that a monopsony exists because growers do not earn as much money as Dr. Taylor believes they should. In his words, they are not getting a "competitive return" on their investment. (Ex. 2: Taylor Dep. No. 2 at 38.) This is because the integrators "control the profitability of the growers." (Ex. 3: Taylor R. at ¶ 35.)

He believes that "competitive return" should be measured based on "economic accounting" or "financial accounting," (Ex. 1: Taylor Dep. No. 1 at 90), not just on whether the growers are able to take enough cash out of their operations to feed, house, and clothe their families and send their children to college. He admits, however, that the growers may be getting sufficient cash flow to do just that. (*Id.* at 46-48, 90.) He also admits that banks lend money to growers in the belief that the growers will make enough money to pay them back. (*Id.* at 46, 98) In his view, the fact that a farm is "cash flowing," that is, producing cash for the farmer to live on, is not proper "economic accounting." (*Id.* at 98.)

He insists that growers should be earning enough money to obtain some unspecified "reasonable" return on investment as calculated by this "economic accounting." He admits he does not fully understand economic accounting. (Id. at 48.) He has never done a complete "economic accounting" relating to growers in the IRW. (Ex. 1: Taylor Dep. No. 1 at 48, 212-213; Ex. 2: Taylor Dep. No. 2 at 145.) Indeed, perhaps most astonishing of all, Dr. Taylor, whose entire thesis is grounded on the argument that the growers do not earn "enough" money, never calculated the profitability of any individual grower, any group of growers, or all the growers in the IRW collectively. (Ex. 1: Taylor Dep. No. 1 at 188.) In other words, he did not use any analysis that could be considered an economic methodology, much less an analysis that could be reproduced.

Yet he is sure that the growers are not making enough money. He is sure because a survey of growers conducted a decade or more ago (but not by Dr. Taylor) concluded that "67% (of respondents) stated that they are not getting a fair return on their investment." (Ex. 3: Taylor R. at ¶ 28.) But that survey alone cannot support his conclusion (even if relying on a survey alone were a valid exercise of economic expertise). Among the many problems with this so-called methodology is that there is no indication what the respondents in the survey believe is a "fair return," and no indication what Dr. Taylor thinks is a fair return. Dr. Taylor leaves us to speculate how the growers' level of satisfaction with their income compares to that of any other segment of the population, including other farmers, factory workers, or office workers.

This evidence does not provide a sufficient basis for his conclusion that the integrators have total economic control over growers, much less control over the growers' decisions how to handle litter. *See, e.g., Champagne*, 458 F.3d at 1080 n.4 (expert's report excluded because it

contained assertions about company's ability to acquire sales persons without talking to a single potential sales person who had declined an offer).

2. Dr. Taylor has never investigated the extent or frequency of growers' switching from one integrator to another, so he is not entitled to base an opinion on the supposition that such switching does not occur.

Dr. Taylor simply assumes that growers want to, but are unable to, switch from doing business with one integrator to doing business with another. He acknowledges that such switching occurs (Ex. 2: Taylor Dep. No. 2 at 43), but he has no idea how frequently. (Ex. 1: Taylor Dep. No. 1 at 35; Ex. 2: Taylor Dep. No. 2 at 43, 45.) He believes it is a "small percentage" (Ex. 4: Preliminary Injunction Transcript (hereinafter "P.I.T.") at 962), but he has no numbers or other basis for his view.

In fact, he has not even studied the contracts between the growers and the integrators to find out when and under what conditions switching is permitted. (Ex. 2: Taylor Dep. No. 2 at 44-45.) Nor does he present any analysis of how much switching would need to occur before he would conclude that a monopsony does not exist: that is, he does not know what the threshold is between the presence and absence of what he views as a monopsony. That is not economics; it is just opinion ungrounded in facts or analysis.

And the undisputed record in this case refutes this claim. Gary Murphy, President of Poultry Operations for defendant Simmons, testified that in the previous year alone (2007) approximately 160 chicken houses moved their business from Simmons to one of its competitors. (2/13/08 Affidavit of Gary Murphy, Dkt. No. 1535.) Is that experience common to the other integrators? Do other integrators experience a higher or lower rate of growers abandoning them to do business with other integrators? Why? Dr. Taylor has no such data.

3. Dr. Taylor is guessing about why some contracts between integrators and growers are similar, and why others are different.

One of the key elements of Dr. Taylor's opinion that a monopsony exists is that (a) the contracts between the growers and the integrators are uniform, which he concludes means (b) that they are "contracts of adhesion," which he concludes means (c) that the integrators have excessive market power over the growers. (Ex. 3: Taylor R. at ¶¶ 16-21.)

Even assuming that the contracts are in fact uniform, there is no basis for the conclusion that market power is the only possible reason for the uniformity. In particular, Dr. Taylor fails to rule out the proposition that the Packers' and Stockyards Act, 7 U. S. C. §§ 181-229b, requires such uniformity. Although he is not a lawyer (Ex. 2: Taylor Dep. No. 2 at 30), and he does not know if the act requires uniformity for similarly-situated growers (*id.* at 52, 99), he nevertheless opines that the integrators' position that the act requires uniformity is a "pretext." (*Id.* at 53-54.) Simply put, he has no foundation and is not competent to form such an opinion.

Dr. Taylor concludes that the Act is mere "pretext" in part because he concludes that the integrators enter into "sweetheart" contracts with their own executives, proving to him that the PSA does not in fact require uniformity. It is not just his lack of legal expertise that undermines this argument. He also discounts other reasons why some contracts may be similar and others dissimilar (Ex. 2: Taylor Dep. No. 2 at 97-98), and has never even seen one of the "insider" contracts with a defendant in this lawsuit. (*Id.* at 128; Ex. 4: P.I.T. at 955.) Finally, his testimony about "sweetheart" deals for executives has no connection to any particular Defendant, and is therefore irrelevant.

4. Dr. Taylor cannot support his claim that the integrators will not do business with growers who are more then 50 miles away from the integrators' facilities, and he is guessing about what effect such a restriction would have on competition, even if it did exist.

Dr. Taylor claims that the integrators "control" the location of the growers' real estate. (Ex. 3: Taylor R. at ¶¶ 36, 50.) The growers' real estate, of course, is not mobile and the integrators cannot control the location of the growers' farms. Dr. Taylor apparently means that the integrators maintain their market power by refusing to do business with growers located more than 50 miles from their facilities, and that this refusal deprives the growers of any choice about which integrator they do business with.

Dr. Taylor bases his belief in this 50-mile limit – inappropriately – on a single statement that used to be, but is no longer, included on a single page of a single website of a single Defendant. (Ex. 2: Taylor Dep. No. 2 at 59-60, 90.) It would not be that difficult to plot the location of the integrators' facilities and the growers' farms on a map of the IRW to analyze whether such a restriction exists. But Dr. Taylor has done no investigation into whether growers in the IRW have one or more than one potential integrator with which they can do business.

Accepting just for now Dr. Taylor's assertion that the integrators will not do business with a grower more than 50 miles from one of their facilities, one would still want to know for various growers: How many integrators are there within 50 miles of your farm? Have you done business with one or more than one of them? Have you ever switched from one to the other? How frequently? Why?

Dr. Taylor has no idea what the answers to any of these questions are, and his proposed testimony will not help the jury consider them.

II. Even if the integrators had market power over the growers, no recognized economic theory yields the conclusion that such power amounts to "control" over the growers' disposition of poultry litter.

Dr. Taylor's biggest leap of faith is the leap from "growers don't make as much money as I think they should" to "integrators force the growers to dispose of litter illegally." Not a shred of evidence or logic, and not a shred of economic expertise or training, support this leap or either of its endpoints.

Even if Dr. Taylor could support the proposition that the growers do not make "enough" (by some undetermined standard) money, that proposition would not make more or less likely Plaintiffs' claim that the integrators control the growers' decisions about litter handling. Dr. Taylor has cited no economic, political, sociological, or legal doctrine to support the proposition that a business entity that "takes advantage" of another business entity in a manner hypothesized by Dr. Taylor thereby "controls" the decision-making of that other entity. The vague notion of "economic overreaching" simply cannot be converted to the notion of legal "control." Thus, even if Dr. Taylor succeeded in convincing a jury that "economic overreaching" has occurred, he would not assist the jury in determining whether the integrators "controlled" the growers.

The leap of logic does not just lack logic. It lacks facts to support it. Dr. Taylor does not know:

- how much money the growers earn from the disposition of the litter, including its use and sale to others,
- how growers decide whether to dispose of or sell poultry litter,
- what the growers in the IRW do with their litter,
- how the growers' decisions would be changed, if at all, if the contracts between the integrators and the growers conformed to Dr. Taylor's beliefs, or

- exactly what those beliefs are.

If, as Dr. Taylor asserts, lack of money from the integrators causes the growers to handle litter improperly, then an increase in money coming from the integrators would change the growers' practices. That is, if less money meant improper handling of litter, then more money would mean better disposition of litter. But there is no evidence of that at all. No grower has so testified, no study has so concluded, and nothing in law or logic or economics dictates such a result. In fact, if nothing changed but an increase in the amount of money that integrators pay growers, the most logical conclusion is that the growers would simply keep the extra money, improving their lifestyle, eating better food, living in better houses, or spending more money on recreation or on their children's education. All of these may be admirable uses for money, and growers are just as likely to use the "extra" money for those purposes, rather than changing their litter handling practices.

Dr. Taylor has admitted repeatedly that it is the growers—not the integrators—who decide how to handle the litter produced by the growers' operations. (Ex. 1: Taylor Dep. No. 1 at 80-82, 176; Ex. 2: Taylor Dep. No. 2 at 31; Ex. 4: P.I.T. at 967-68.) The integrators never own the litter, (Ex. 4: P.I.T. at 960), and the integrators do not tell the growers how to deal with litter. (Ex. 2: Taylor Dep. No. 2 at 92, 93.) The growers make those decisions themselves. (*Id.* at 135, 136.)

Dr. Taylor observes that representatives from the integrators visit the growers' facilities, but he contends at most the representatives concern themselves with the quantity of litter and how it is handled inside the four walls of the growers' buildings. (*Id.* at 91-93.) But nothing in this record or the Taylor Report suggests that the integrators' representatives have any input, much less "control," over what happens to the litter after it leaves the buildings.

In *City of Tuscaloosa v. Harcros Chems.*, 158 F.3d 548 (11th Cir. 1999), an antitrust case alleging, among other things, price-fixing and conspiracy, the court discussed the admissibility of an expert statistician's data and methodology. The expert's testimony was excluded to the extent he opined as to the existence of a conspiracy, using only his subjective judgment. *Id.* at 564. The expert's improper "characterization of documentary evidence as reflective of collusion," and "characterizations of particular bids as 'signals'" were deemed unhelpful to the jury, because "the trier of fact is entirely capable of determining whether or not to draw such conclusions." *Id.* at 565. Similar to the expert in *Tuscaloosa*, Dr. Taylor characterizes certain evidence – such as integrators' increasing insistence in recent years that growers follow environmental and health regulations in their litter disposal – as demonstrative of the integrators' total control over growers' disposition of litter. This is improper and does not help the trier of fact.

III. Dr. Taylor's "opinions" regarding the history of poultry production and integrators' knowledge should be excluded.

Continuing to let his personal opinions get in the way of economic analysis, Dr. Taylor opines about what the integrators knew about potential environmental concerns with poultry litter and when they knew it. He bases these inferences on his reading of the history of poultry production and academic debate about that production. But his opinions about who knew what and when are based on pure speculation. Moreover, the inquiry into which articles were published in which journals is a matter of ordinary fact that is not a proper subject for expert testimony. Plaintiffs may not present expert testimony that simply vouches for inferences from plain facts that they want the jury to draw.

In the second section of his report, paragraphs 50 through 63, Dr. Taylor expresses a single opinion that "integrators have been well aware for about two decades that runoff and

leaching of phosphorus from land application of poultry litter is of environmental concern in several areas of the U.S., including the IRW." (Ex. 3: Taylor R. at ¶ 61) The rest of that second section contains facts that purportedly support this conclusion. Dr. Taylor presents a series of maps developed by the United States Department of Agriculture showing poultry production and the load of various nutrients like nitrogen and phosphorus throughout the country. (*Id.* at ¶¶ 50-60.) In paragraphs 62 and 63, Dr. Taylor presents a bibliography of various articles and other presentations showing "economic and scientific dialog and concern" about "environmental concern with highly concentrated livestock and poultry production in small geographical areas." (*Id.* ¶ 62.)

A. Dr. Taylor's opinion regarding defendants' knowledge is a matter of inference from plainly understood fact, and is not appropriate expert testimony.

Dr. Taylor contends that certain Defendants (although he never identifies the Cargill Defendants) received some of these publications. But apart from general knowledge of environmental concerns, Dr. Taylor does not identify what Defendants purportedly learned from these publications.

Even if he had, however, that would not be the proper subject for his testimony. Under Rule 702, an expert's testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue." In determining whether proffered expert testimony will assist the trier of fact, courts consider the following non-exclusive factors: "(1) whether the testimony is relevant; (2) whether it is within the juror's common knowledge and experience; and (3) whether it will usurp the juror's role of evaluating a witness's credibility." *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1123 (10th Cir. 2006). Where the jury can understand the information without the aid of an expert, that expert should be excluded. *See Hayes v. Wal-Mart Stores, Inc.*, 294 F. Supp. 2d 1249, 1251 (E.D. Ok. 2003) ("When the normal experiences and qualifications

of laymen jurors are sufficient for them to draw a proper conclusion from given facts and circumstances, an expert witness is not necessary and is improper."). Put another way, the expert should be excluded "if all the primary facts can be accurately and intelligibly described to the jury, and if they ... are as capable of comprehending the primary facts and of drawing correct conclusions from them." *Sanders v. Fireline, Inc.*, 295 Fed. Appx. 373, 374, 2008 WL 4442431, *1 (2d Cir. 2008); *see also Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962).

Dr. Taylor's opinion about what the integrators knew and when they knew it is a question of plain fact that is inappropriate for expert testimony. There is no need for an expert to explain to the jury the primary facts related to integrators' knowledge of the environmental concerns. If that is a legitimate issue for trial, then Plaintiffs can offer direct evidence – such as internal e-mails, reports, industry newsletters, and testimony – to try to prove their knowledge. But Plaintiffs cannot use an expert to vouch for that evidence. An expert may not "offer testimony that merely tells the jury what result they should reach ... . Expert testimony of this type is often excluded on the grounds that it states a legal conclusion, [or] usurps the function of the jury in deciding the facts." *United States v. Simpson*, 7 F.3d 186, 188 (10th Cir. 1993) (citations omitted).

B. Dr. Taylor's opinion about the integrators' knowledge is speculative.

Moreover, even if the integrators' knowledge were an appropriate subject for expert testimony, Dr. Taylor's opinion should be excluded as speculative and without foundation. His opinion is based on a the history of poultry production in the United States and allegedly corresponding increases in excess phosphorus and nitrogen from manure, (Ex. 3: Taylor R. at ¶¶ 50-60), and the history of various academic discussions about potential excess manure and the economic cost of removing it. (*Id.* at ¶ 62-64.) But he frankly admits that he does "not have any

direct evidence that the integrators were aware" of the environmental concern. (Ex. 2: Taylor Dep. No. 2 at 67.)

In this section of his report, Dr. Taylor does not present any analysis for what Defendants knew and when they knew it; instead, he simply asserts that because poultry production was increasing and because academics like Dr. Taylor were concerned about pollution, integrators had certain knowledge of that alleged "danger." No doubt Dr. Taylor believes this, but it is not appropriate for him to use his expert testimony as a platform for sharing his personal beliefs on the jury. Defendants have a different view of the history of poultry production, the regulation of their industry, and the environmental science regarding use of poultry litter. In any event, on matters like what Defendants knew about potential pollution, Plaintiffs should be required to present direct evidence, from which the jury can draw its own conclusions.

Moreover, Dr. Taylor does not tie any specific knowledge to any particular Defendant. The most he does is identify a few of the publications in his bibliography that certain defendants may have received. Rather, he elides the difference between the reports certain defendants received – which include, for example, the formation of a "cooperative effort of industry and government to identify and adopt prudent uses of poultry by-products that will preserve the quality of water" (Ex. 3: Taylor R. at ¶ 62(d)) – and academic studies that allege more serious environmental harm. (*Id.* at ¶ 62(j).) Nor does he identify any differences in levels of knowledge among the Defendants, but instead apparently assumes uniformity without identifying any basis for such an assumption.

Indeed, Dr. Taylor says nothing specific about the knowledge of any particular Defendant. Dr. Taylor was not employed by any integrator, he did not interview any integrator, and he did not base his opinion on any internal documents or other evidence of the integrators'

knowledge. *See* Fed. R. Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

Dr. Taylor is an economist. He does not have expertise to testify about fertilizer application and proper nutrient levels, much less to divine the knowledge of corporations. As a result, Dr. Taylor has no foundation for making any declaration about any particular Defendant's knowledge.

IV. Dr. Taylor's calculation of the cost of transporting the litter should be excluded.

Dr. Taylor's opinion of the "proper" value of poultry litter in the IRW and his calculation of the alleged cost to ship that litter to eastern Arkansas should be excluded as irrelevant. Plaintiffs present Dr. Taylor's calculation as a measure of unjust enrichment, but purportedly avoided transportation costs are not a legally recognized measure of unjust enrichment.

Moreover, Dr. Taylor's cost calculations do not pass the *Daubert* reliability test. Dr. Taylor did not use a reliable methodology to make those calculations. *See Truck Ins. Exch.*, 360 F.3d at 1210. As with his other opinions, Dr. Taylor's view of the value of the poultry litter ignores the actual facts of the market for poultry litter and does not include important calculations that would be necessary even on his own terms.

A. Dr. Taylor's opinion that the value of poultry litter in the IRW is unfounded, causing his entire opinion to collapse.

Dr. Taylor's analysis proceeds in several steps. First, Dr. Taylor asserts that the "true value" of the poultry litter is zero. (Ex. 3: Taylor R. at ¶¶ 68-70.) Dr. Taylor discounts the actual market for poultry litter, including the farmers who use it on their fields and others who buy and sell it every day. (Ex. 1: Taylor Dep. No. 1 at 167; Ex. 5: Deposition of Mike Traylor, Nov. 27, 2007, at 24:23-27:12, 41:2-7) Indeed, elsewhere in his report he accepts that the litter

has a value of $7.00 per ton. (Ex. 2: Taylor Dep. No. 2 at 161; Ex. 3: Taylor R. ¶ 73, Table 2.)

Instead, he contends that, based on the purported saturation levels of phosphorus, potassium, and nitrogen on fields in the IRW, the litter has no value in that region. But Dr. Taylor follows no scientific methodology to get there. He did not do any tests, nor does he cite tests done by others; rather, he provides the unfounded assertion that "soil P (and K) tests . . . indicate that most fields" show no need for those nutrients. (Ex. 3: Taylor R. ¶ 68.) He admitted that he did not do "detailed analysis on the on-farm economics of commercial fertilizer and/or litter application" (Ex. 1: Taylor Dep. No. 1 at 16; Ex. 2: Taylor Dep. No. 2 at 158), and he admits that particular fields or farmers may have use for poultry litter. (Ex. 1: Taylor Dep. No. 1 at 167.) Nevertheless, he concludes that poultry litter has no gross value in the IRW because the nutrient levels exceed the "agronomic maximum" for the nutrients supplied by poultry litter (or other fertilizer). (Ex. 3: Taylor R. ¶¶ 69-70.)

This is not a *economic* opinion about the market value of poultry litter; it is an *agricultural* opinion about whether application of poultry litter provides any benefit. That could be subject of debate by qualified experts. But Dr. Taylor is an economist; he cannot – and did not – competently wade into that debate. As a economist, Dr. Taylor is qualified to opine on the market value of poultry litter. But to do that, he has to consider the actual market for that litter in the region. Because he did not do so, his opinion of the value of litter in the IRW fails the basic methodological *Daubert* test; he cannot consistent with sound economic method ignore the actual market.

And because Dr. Taylor's opinion of the value of the poultry litter fails, the rest of his analysis collapses. His conclusion that poultry litter has no value in the IRW is necessary to support his cost calculation, because in Dr. Taylor's telling, (a) the litter should have been

shipped to Eastern Arkansas, where it does have value as fertilizer, and (b) the integrators thus avoided the cost of shipment. If the poultry litter has value to farmers in the IRW, then Dr. Taylor's analysis falls apart, because the litter would not be shipped to Eastern Arkansas in any event. And because poultry litter is actually used, bought and sold in the IRW, it plainly has economic value.

B. Dr. Taylor's calculation of shipping costs does not follow an appropriate methodology.

Dr. Taylor's next step – the actual calculation of purported costs the integrators avoided – also fails the *Daubert* test. Dr. Taylor has not conducted an adequate investigation and he ignores or assumes too many important factors to have a valid methodology that could be tested or peer-reviewed. Under *Daubert*, "any step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology." *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 782 (10th Cir. 1999) (quoting *In re R.R. Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 745 (3d Cir. 1994)).

Dr. Taylor's calculation of avoided costs is as follows: he relies on a 2007 academic study to provide the basis for his calculations and then performs various calculations to determine the purported cost to transport the poultry litter various distances and in various amounts to eastern Arkansas. (Ex. 2, Taylor Dep. No. 2 at 171-72). He also assumes 100% of the remaining "net" cost would be borne by the integrators. (*Id.*) Even if this were a legitimate methodology on its face, in application, Dr. Taylor does not follow the methodology, thus rending his opinion unreliable under *Mitchell* and leaving the Court and jury to rely on his mere say-so regarding the costs.

Dr. Taylor makes several leaps that are not based on evidence. These include:

- He assumes that 100% of the additional costs would be borne by the integrators, even though he acknowledged in his deposition that growers would incur some of the costs and some, if not all of the costs, will be passed on to consumers. (Ex. 1: Taylor Dep. No. 1 at 157, 162-163). Indeed, in his initial opinion in this case, Dr. Taylor states that all the costs would be passed on to consumers. Dr. Taylor cannot give an opinion of what costs the integrators would bear without accounting for this dynamic.
- He assumes, without any evidence, that the "most viable alternative use of excess litter" is in eastern Arkansas. (Ex. 3: Taylor R. at ¶ 71). Dr. Taylor's entire analysis is based on this, but he gives the Court only his personal verification that "it is assumed" that this is the most viable alternative use of the litter. (*Id.*)
- He did not consider the actual expenses and income of shipment of poultry litter, some of which is currently occurring, leaving a gap in his economic methodology. (Ex. 2: Taylor Dep. No. 2 at 18-20).

An economist cannot give a valid opinion on what something would cost and who would bear the burden without considering all the relevant economic factors, including the actual experience of people in the market. But instead of doing a rigorous analysis that could be tested or reproduced, Dr. Taylor simply accepted an initial cost study at face value and applied some mathematics based on transportation and application costs and amounts. He made no inquiry about the actions of individual growers or individual integrators in the actual market. Instead, he picked out a method for calculating costs and assumed that defendants would have borne that cost. Because he did not follow his own stated methodology, but instead skipped steps and used unfounded assumptions, the Court should exclude Dr. Taylor's opinions regarding the cost of shipping litter.

V. Dr. Taylor's opinions about the law and about what is "responsible" should be excluded.

As Dr. Taylor acknowledged several times, he is not a lawyer, and he is not qualified to give legal opinions. Therefore, his views on what the Packers and Stockyards Act provides, found at paragraphs 16 -21 of his report, must be excluded because he lacks the expertise to offer them.

Dr. Taylor also opines about what he believes a "responsible" integrator should have done. (Ex. 3: Taylor R. at ¶¶ 72-73.) Because there are no economic standards for what is "responsible," his personal opinions about what is "responsible" and "irresponsible" are irrelevant.

Likewise, Dr. Taylor should not be allowed to offer opinions to the jury that amount to political or sociological rants, such as the alleged status of the growers as "serfs" and his views that the actions of integrators "threaten democracy."

CONCLUSION

Experts are supposed to be helpful to the finders of fact. They are not supposed to subject judges and juries to sociological or political diatribes masquerading as expert opinion. Dr. Taylor is a professor of economics at a respected institution of higher learning. But in this case he has put his expertise on the shelf, he has failed to go out into the field to collect relevant facts, and he has abjured recognized methodologies in his field. As a result, this Court should fulfill its role as gatekeeper under *Daubert*, *Kumho Tire*, and *Truck Insurance Exchange* by excluding Dr. Taylor's proposed testimony.

Date: May 18, 2009

Dated: May 18, 2009

Respectfully submitted,

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